JUN 15 2005

No. 04-1067

In The Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

JOINT APPENDIX

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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Opinion of the Court of Appeals of Georgia, *Georgia v. Randolph*, 264 Ga. App. 396, 590 S.E.2d 834 (2003) ..... App. 7

Opinion of the Supreme Court of Georgia, *Georgia v. Randolph*, 278 Ga. 614, 604 S.E.2d 835 (2004) ..... App. 1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 27, 2001 – Indictment against Scott Randolph filed in the Superior Court of Sumter County, Georgia

Jan. 17, 2002 – Randolph filed a motion to suppress

Jan. 25, 2002 – Randolph filed a brief in support of the motion to suppress

Oct. 3, 2002 – State filed a brief opposing Randolph's motion to suppress

Oct. 3, 2002 – Evidentiary hearing held on the motion to suppress

Oct. 17, 2002 – Order entered by the Superior Court, denying Randolph's motion to suppress

Nov. 26, 2002 – Order entered by the Court of Appeals of Georgia, granting Randolph's application for interlocutory appeal

Dec. 4, 2002 – Randolph's notice of appeal filed

Dec. 1, 2003 – Opinion of the Court of Appeals of Georgia

Nov. 8, 2004 – Opinion of the Georgia Supreme Court

IN THE SUPERIOR COURT OF SUMTER COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	**INDICTMENT NO. 2001-SU-R-699**
VS.	**POSSESSION OF COCAINE**
SCOTT FITZ RANDOLPH,	
Defendant.	

MOTION TO SUPPRESS

(Filed January 17, 2002)

NOW COMES SCOTT FITZ RANDOLPH, Defendant in the above-styled action, by and through his Attorney of Record, with prior leave of the Court, aggrieved by unlawful searches and seizures made by the state and local officers under purported authority did seize certain described property, namely alleged cocaine and cocaine residue, moves this Court to quash said warrants and indictments, and to suppress as evidence any object, article, thing or other evidence gained or thereafter gained by state, local, and/or federal agents.

1.

Defendant shows that he is charged in the above-styled indictment with the offense of possession of cocaine and that he denies said allegations in their entirety.

2.

The Defendant further alleges that the alleged cocaine seized at his residence and office will be offered as evidence against him at any trial of the above-styled charges in said indictment and that further and finally all of the

charges set forth in said indictment are the result of this illegal search and seizure aforesaid.

3.

Defendant shows that on the date of the arrest Defendant was present at his home with his wife, Janet Randolph. Officers had appeared at the residence in response to a domestic disturbance call.

4.

The officers present requested the right to search the residence of Scott F. Randolph and Janet Randolph. Janet Randolph granted permission to search the home, but Scott F. Randolph steadfastly refused to grant said permission.

5.

In addition, this residence also served as an office for the law practice of Scott F. Randolph and Scott F. Randolph explicitly denied permission for the officers to search this office, which was solely in his control and dominion and reiterated his refusal to allow the search of the home without a warrant.

6.

Despite the refusal of Scott F. Randolph to allow the search of the home and his office, the officers proceeded forward with the search, without a warrant, and without permission. Furthermore, once the search ensued, the Defendant's wife, Janet Randolph, withdrew her

permission and consent to search the home and the officers continued and ignored her request to withdraw permission.

7.

The action performed by law enforcement in searching the home and office of Scott F. Randolph were in violation of Scott F. Randolph's Fourth Amendment due process rights, guaranteed under the United States Constitution, and the Georgia State Constitution and constitute an illegal search and seizure, which is prohibited by both the United States Constitution and the Georgia State Constitution.

WHEREFORE, the Defendant prays and demands that his Motion bye inquired into by this Honorable Court; and

(a) That a day certain be set requiring the District Attorney of the Sumter County Superior Court to be and appear at a certain time and day to show cause why the prayers and demands of this Defendant should not be granted; and

(b) That this Honorable Court issue its Order suppressing any unreasonably obtained evidence and testimony relevant thereto, together with any after-gained evidence or testimony, and rule further the same inadmissible upon the trial of the charges set out in the above-numbered indictment.

Respectfully submitted this 17th day of January, 2002.

COLLIER & GAMBLE

/s/ W.T. Gamble III
W.T. Gamble, III
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that I have this day served Richard E. Thomas, Special Assistant District Attorney at 1216 Dawson Road, Suite 202, Albany, Georgia 31707, with a copy of the foregoing matter by depositing in the United States Mail, a copy of same in a properly addressed envelope with adequate postage thereon.

This 17th day of January, 2002.

/s/ W.T. Gamble III
W.T. Gamble, III

This Document Prepared By:

/s/ W.T. Gamble III
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IN THE SUPERIOR COURT OF SUMTER COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	:	
Plaintiff,	:	
Vs.	:	CRIMINAL INDICTMENT NO. 01-R-699
SCOTT FITZ RANDOLPH,	:	
Defendant.	:	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE

(Filed January 25, 2002)

Comes now the Defendant, Scott Fitz Randolph, by and through his attorney of record, W.T. Gamble, III and files this his brief in support of his motion to suppress which was filed with the Clerk of the Superior Court of Sumter County on the 17th day of January 2002 as follows:

FACTS OF THE CASE

On or about the 6th day of July 2001 law enforcement officers responded to a domestic disturbance call at the home of Scott Fitz Randolph and his wife (at the time) Janet Randolph. Upon arriving at the scene, the officers discovered that the couple had been arguing as a result of a marital dispute. The police officers at the scene asked if they could be given permission to search the marital home of the parties and Janet Randolph initially gave her consent for the home to be searched. Scott Fitz Randolph was present during this entire conversation and vigorously objected to granting permission for the search of the marital home. In addition, Scott Fitz Randolph's law office

was maintained in a portion of this home and he objected to any search of this property as well. The police officers did not have a valid search warrant at the time they responded to the domestic disturbance call and no search warrant was obtained prior to the police officers beginning their search of the marital home. Despite the objections by Scott Fitz Randolph, the police officers proceeded to search the home including Scott Fitz Randolph's office. At the conclusion of the search, the law enforcement officers alleged that cocaine was found in the home, discovered in the office of Scott Fitz Randolph, and subsequently Scott Fitz Randolph was arrested for possession of cocaine. Prior to the discovery of any alleged illegal substance, however, Janet Randolph also withdrew her permission for the search to continue and despite this withdrawal, the police continued to search discovering the alleged illegal contraband. Defendant Scott Fitz Randolph contends this search was illegal and in violation of the 4th Amendment of the United States Constitution and the 4th Amendment of the Georgia State Constitution. Furthermore, Defendant contends that the search was unreasonable under the 4th Amendment and not within any of the few specifically established and well delineated exceptions as discussed and ruled in the case of *Katz vs. United States*, 389 US 347, 357, 88 SE 507, (1967).

ARGUMENT AND CITATION OF AUTHORITY

In *Katz*, the United States Supreme Court ruled, and discussed in great detail, a search without prior approval by a judge, or magistrate, or the issuance of a warrant would generally be per se unreasonable unless it met a few well delineated exceptions. *See* Katz, 357. The Georgia Supreme Court noted one of these exceptions is when a

third party grants the right to search without a warrant if that third party possesses common authority over the premises or had a sufficient relationship to justify the consent. *Atkins vs. State*, 254 Ga 641, 31 SE2d 597, (1985). The court cited several other United States Supreme Court decisions and justified this ruling because it is reasonable to assume persons with joint access have this type control. Therefore, it is uncontraverted [sic] that if Ms. Randolph had been present at her home, alone, she had authority to grant consent. The issue before the court today, however, is one which is of apparent first impression in the State of Georgia. The question which must be resolved before the court is "whether a law enforcement agency or officer may conduct a warrantless search of a home or office of persons (both present) with joint access and authority to grant permission if one of the owners objects to the search and the other grants permission."

There do not appear to be any cases in Georgia which have addressed this specific set of circumstances in the context of a search of a marital residence. Foreign jurisdictions and legal treatisies, however, strongly support the proposition a joint occupant of property, is subject to the property being searched if that person is unavailable and permission given by the other occupant, but if the joint occupant is present and objecting he should not have his constitutional rights ignored simply because a shared property interest exists. *See* 68 Amjur 2d searches and seizure § 92. It is important to note at the time police arrived the couple was involved in a heated domestic dispute. This dispute ultimately led to a divorce proceeding which has now been finalized in the Superior Court of Sumter County. (See Randolph vs. Randolph, Civil Action File No. 99-CV-968)

Courts have evaluated situations in which an angry spouse granted permission to police officers to search the home in hopes of causing trouble for the offending spouse. In some cases a spouse's antagonism toward the other spouse withdraws the authority of this spouse to grant permission for a search. See *State vs. Gonzalez-Valle*, 385 So. 2d 681 (Fla. Dist. Ct. Ap. Third District 1980) and *May vs. State* 780 SW2d 866 (Tex. App. Dallas 1989). Both of these courts took the position that the antagonistic wife granted permission out of anger, spite, hostility, and antagonism and the courts did not wish to foster this type ill-will between married parties. In effect, the court's ruled generally one spouse has agency to grant permission to search property owned by the other spouse so long as each has common access but this agency is destroyed if the motivation is based on ill-will and antagonistic feelings. There are several other foreign jurisdiction cases which seem to follow this same rule but there are also several cases which have ruled the antagonistic spouse does not destroy the agency. It appears, the case of *US vs. McAlpine*, 919 F2d 1461 greatly criticized both *May* and *Gonzales* in dicta stating that the case of the *US vs. Matlock*, 415 US 154, 94 S. Ct. 988, (1974) effectively rejects this agency analysis in favor of an analysis which focuses solely on the consenting parties relationship to the property rather than their relationship to the offended party.

In the case before the court, it is important to note that both spouses were present during the time permission was granted to search the home. One spouse objected to the search, Mr. Randolph, and one spouse, the angry and vindictive Ms. Randolph, consented to the search. Of equal importance, part of the consent was given to search the office of Scott Randolph which was not property for which

both had a common interest and common access. It is believed Ms. Randolph will testify she had access to the office and that she served as a secretary/paralegal to Mr. Randolph but, these positions do not grant her authority to consent to the search of this office. She would have no more right to consent to a search of these areas than would a lawyer's paralegal or secretary have a right to consent to a police officer searching their boss' office. Clearly, this type search would not be allowed and the search of Mr. Randolph's office and home should not have occurred either. Once Mr. Randolph invoked his constitutional right to reject the search without a warrant, regardless of his spouse's permission, the police were under a duty to attempt to receive a search warrant. It is not surprising that courts have ruled when one party is not present, and the other party is present, the present party can consent to a search of commonly held property because of the shared property interest. It is an entirely different situation, however, when both parties are present and one does not grant permission.

Of equal importance, courts throughout the United States have consistently ruled that a spouse does not have permission, even concerning co-tenancy or occupancy, to consent to the search of personal effects of the common occupant. See, *State vs. Evans*, 45 Haw. 622, 372 P.2d 365 (1962) (search of cufflink case in husband bedroom bureau drawer illegal), *Matthews vs. State*, 89 Md. App. 488, 598 A.2d 813 (1991) (Court allows evidence gathered but states a personal drawer of the Defendant could not be searched even with permission by wife), *Henry vs. State*, 253 Miss. 263, 154 So.2d 859 "(1963) appeal to Supreme Court, judgment vacated on other grounds (Wife consented to

search of husband's personal automobile, court rules not valid).

In the *State vs. McCarthy*, 26 Ohio State. 2d87, 55 Ohio Op.2d 161, 269 N.E.2d 424 1971 the Ohio Court stated a spouse's consent is limited to the areas of the home under common control of the parties, as distinguished from a search which was directed toward personal effects of the absent spouse. Scott Randolph's office is not an area that should be considered in joint control of the parties and certainly meets the definition of personal effects. A lawyer's files, and other matters within his office, are highly protected and it is unimaginable that this area would not be considered personal and beyond the scope of consent of the wife. It should be noted that each court made its analysis of whether or not permission could be granted in the context of a search directed toward personal effects of an ***absent*** spouse. In our case, Scott Randolph was present and objecting which further strengthens the argument that no search should have occurred.

California and Florida courts have consistently ruled that if both parties are present, and one objects, a search can not [sic] occur without the police obtaining a warrant. See *Duke vs. Superior Court*, 1 Cal. 3d314, 461 P.2d 628 (1969) and *People vs. Reynolds*, 55 Cal. App. 3d357, 127 Cal. Rp. Tr. 561 (1976) and *Lawton vs. State*, 320 So.2d 463 (Fla. Dist. Ct. App. 2d Dis. 1975) In the Florida case, the court ruled that a search predicated upon the consent of a joint occupant is invalid when the other joint occupant is physically present on the premises and affirmatively objects to the search. *Id.* In this case, a wife who was separated from her husband came to visit the husband in their once marital apartment discovering the husband

with another woman. The separated wife went next door and called the police. Upon arrival of the police, the husband stood in the doorway to the apartment, placed his arms across the doorway, and forbid the police to enter. The wife insisted the police had authority to enter, and based on this consent, the police entered the apartment, searched the apartment, and found marijuana. The court stated it is one thing to find a consent to search shared premises binding upon an absent, non-consenting Defendant, but quite another to hold the consent binding upon a Defendant who has been requested by the police to consent to a search of his property and who has refused that permission. This case is square on the head of the facts of the Randolph case. Scott Randolph clearly and unequivocally denied the police the right to search. This case is not similar to those normally cited whereby one spouse is not present and the other grants permission. In *People vs. Reynolds*, the court stated the right to privacy of the non-consenting co-occupant should always prevail to preclude a valid search. The ruling in *Duke vs. Superior Court*, closely tracts the two previously cited cases.

A final foreign jurisdiction case, *State vs. Walker*, 965 P.2d 1079 (Wash. 1998) states in clear and concise language that a wife may consent to the search of a marital residence when she has equal control over the premises **only during his absence**. *Id.* In this case, the wife had consented to a search of the marital home away from the premises and when the police arrived the husband arrived at the home as well. The husband never refused the right to search the home but he also did not affirmatively consent to the search. The high court of Washington stated the wife's consent could be valid as to any evidence obtained which might be used against her but that any

evidence obtained concerning the husband was inadmissible and could be only used against the wife. *Id.*

The courts have also held that a spouse has no authority to consent to the warrantless search of a premises if the police have been informed beforehand that the absent spouse will not or does not consent to this type search. See, *Daniels vs. State*, 534 So. 2d 628 (Al. Crim. App. 1985)

In short, most courts have ruled that if both parties are present and one objects to the search this objection requires the law enforcement agency to receive a court order or a warrant. Some courts, such as the *Walker* court, have gone so far as to state an affirmative consent must be obtained from the spouse if this spouse is present when officers arrive to search. This court should not allow the constitutional rights of Scott Randolph to be cast aside in the wind simply by a disgruntle [sic] spouse granting permission to search property which is lawfully owned by Mr. Randolph and in a relatively exclusive control situation because the office space was Mr. Randolph's and not Ms. Randolph's.

One California court even went so far as to rule that if a wife has been instructed by a husband not to allow a search of the premises that the wife can not [sic] then grant permission to search the premises to law enforcement agencies. *People vs. Fry*, 271 Cal. App. 2d 350, 76 Cal. Rptr. 718 (4th Dist. 1969). In this case, the husband had already been arrested but specifically refused to allow a search of his home by telling his wife during visitation she was not to allow any search. The police officers were aware of these instructions but searched the home without a warrant upon permission by the wife. The court stated the police were aware of these instructions and they could

not rely upon her consent as justification for their conduct. Surely if orally instructing a spouse to refuse consent prohibits a warrantless search, then the spouse being present and stating adamantly refusal directly to the police officers should require court intervention.

As has been stated earlier in this Brief, the State of Georgia has not directly addressed a situation where one spouse refuses permission and another grants permission with both being present. The State of Georgia has adopted the general rule that a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected can grant permission for a search. *Atkins vs. State*, 254 Ga. 641, at 642 331 SE2d 597 (1985). This ruling, however, does not establish the right to grant permission when the other party is present denying permission. In fact, Georgia courts have stated that one of the most important reasons for requiring a search warrant as a condition to a search is a recognition that reasonable restraints must be placed upon a law enforcement official before a search is conducted rather than simply to measure the validity of a search by post-search inquiry into its reasonableness. *Luke vs. State*, 178 Ga. App. 614, 344 SE2d 452 (1986) (dissenting opinion) A requirement that a police officer obtain a warrant to search the home and business of a non-consenting adult is certainly a reasonable restraint and there is no justification for law enforcement to claim there is no need for a search warrant simply because a co-tenant or spouse attempts to override the objection. The constitutional right of each individual is one of the most highly protected rights granted by the United States Constitution. In fact, most authorities would agree the Bill of Rights are our very foundation for freedom in this

country. These Rights must be protected to the fullest extent available under the law and can not [sic] casually, nor carelessly, be waived by other individuals. Scott Randolph uncategorically denied access to search his home and office. Once law enforcement heard this denial, they should have respected his constitutional rights and attempted to receive a warrant. The warrant was not obtained and therefore, all evidence discovered as a result of this search should be declared illegally obtained evidence and suppressed in this matter.

For the foregoing reasons, Defendant requests all evidence seized at the search on or about July 6, 2001 be declared illegal and suppressed.

Respectfully submitted this 23rd day of January 2002.

/s/ W.T. Gamble III
W.T. Gamble, III

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IN THE SUPERIOR COURT OF SUMTER COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v. INDICTMENT NO.01-R-699

SCOTT FITZ RANDOLPH
DEFENDANT

STATE'S BRIEF OPPOSING DEFENDANT'S MOTION TO SUPPRESS

(Filed October 3, 2002)

Comes now the State of Georgia by and through the District Attorney of the Southwestern Judicial Circuit and files this response in opposition to the defendant's motion to suppress.

FACTS

On July 6, 2001 Janet Randolph called the Americus Police Department and requested that an officer come to 224 Brown Street in Americus in reference to a domestic dispute with her husband, Scott Fitz Randolph. 224 Brown Street was the jointly-occupied marital residence of the Randolphs.

When officers arrived, Mrs. Randolph told them that her husband had been using drugs and that drugs were presently in the residence. Scott Randolph was present and refused to consent to a search of the residence. However, Janet Randolph gave consent and led Sgt. B.D. Murray to a room inside the residence. Sgt. Murray observed cocaine on a dresser in plain view in the room. He went outside to retrieve evidence packaging bags

from his vehicle, at which time Mrs. Randolph (at the insistence her husband) withdrew consent to search.

Sgt. Murray left an officer at the residence to prevent destruction of evidence, and obtained a search warrant from the magistrate. He and other officers served the warrant and discovered additional cocaine in various rooms within the residence. No cocaine or other evidence was discovered in the portion of the residence purportedly used by Scott Randolph as a law office. A copy of the affidavit for search warrant, the search warrant, and the search warrant return are attached hereto as Exhibit A.

A Sumter County Grand Jury returned an indictment charging Scott Fitz Randolph with the offense of possession of cocaine and he subsequently filed a motion to suppress the evidence seized during the search of the residence.

ARGUMENT AND CITATION OF AUTHORITY

1. JANET RANDOLPH'S CONSENT TO SEARCH WAS VALID EVEN THOUGH SCOTT RANDOLPH REFUSED TO CONSENT TO A SEARCH OF THE MARITAL RESIDENCE.

". . . [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects

sought to be inspected." *U.S. v. Matlock*, 415 U.S. 164, 171 (94 S.Ct. 988, 993) (1974.)[1]

There is no doubt that Janet Randolph was a co-occupant of the premises and possessed sufficient common authority over the marital home to consent to a search of the premises. The defendant here argues that the Court should adopt a rule that prohibits a spouse from giving consent to search if the other spouse is present and affirmatively objects to the search.[2] However, this argument was rejected by the Georgia Court of Appeals in *Kendrick v. State*, 211 Ga. App. 599 (440 SE2d 53) (1993). In *Kendrick* two detectives located a vehicle that had been used as the "getaway" car in an armed robbery. They knocked on the door of the registered owner (the defendant's wife) and asked about the car. The defendant's wife invited the detectives into the house where they saw the defendant and recognized him from the video tape of the robbery as the perpetrator. The detectives arrested Kendrick at that time. Kendrick later claimed that he had asked the detectives to leave, thereby revoking any consent to enter the residence that had previously been obtained from the wife. The Court held that **"only defendant's wife could**

[1] The reasoning of *Matlock* was reaffirmed and extended in *Illinois v. Rodriguez*, 497 U.S. 177 (110 S.Ct. 2793) (1990). The Court there held that an officer's good faith belief that the third party had authority to consent to a search validated the search even when it was later discovered that the third party did not have such authority. This holding has been followed in Georgia. *Turner v. State*, 246 Ga. App. 49, 51-52 (539 SE2d 553) (2000); *Ford v. State*, 214 Ga. App. 284(3) (447 SE2d 334) (1994).

[2] Defendant makes the bold assertion in his brief that "most courts have ruled that if both parties are present and one objects to the search this objection requires the law enforcement agency to receive a court order or a warrant." (Defendant's brief page 7, 2nd paragraph)

revoke her consent and there is no evidence defendant's wife indicated agreement with the defendant's request or otherwise acted in a manner to revoke her consent." Id., page 601 (emphasis added). See also *Animashaun v. State*, 207 Ga. App. 156, 158 (427 SE2d 532) (1993) (estranged wife who had key to premises still possessed common authority to give consent to enter marital premises even where husband was on premises and refused to give consent.)

Defendant also argues that the Court should adopt an "angry spouse" rule. Such a rule is based on the old agency theory of third party consent which holds that the agency of one spouse to grant permission to search is destroyed by the ill will of one spouse towards the other. Apparently this argument has not been addressed by the Georgia appellate courts. However, this anachronistic argument has been explicitly rejected by courts in other jurisdictions.[3]

In *U.S. v. McAlpine*, 919 F2d 1461 (10th Circuit 1990) the Court cited *Matlock*, infra, and held that it is the consenting party's relationship to the property, not the tenor of her relationship with the defendant, that is determinative of whether she can consent to a search. The Court further held that there was no expectation of privacy where there is shared property and the other co-occupant grants consent to search. As noted in the defendant's brief, this decision criticized two cases cited by the defendant as support for his position.

[3] *State v. McCarthy*, 269 NE2d 424 (Ohio, 1971); *State v. Bartram*, 925 SW2d 227 (Tennessee, 1996); *Commonwealth v. Noonan*, 720 NE2d 828 (Massachusetts, 1999).

In *U.S. v. Sumlin*, 567 F2d 684 (6th Circuit, 1977) the Court cited *Matlock*, infra, and held that the fact that the defendant refused consent to search does not preclude another person who had common authority over the premises from giving valid consent. The Court also held that there is no reasonable expectation of privacy to be protected because a joint occupant assumes the risk of his co-occupant exposing their common private areas to a search.

The courts in the following cases rejected the argument that a spouse or co-occupant cannot give a valid consent to search where the other spouse or occupant refuses to consent: *State v. Crevina*, 266 A2d 319 (New Jersey, 1970); *Commonwealth v. Martin*, 264 NE2d 366 (Massachusetts, 1970); *State v. Rohrbach*, 763 P2d 196 (Oregon, 1988); *City of Laramie v. Hysong*, 808 P2d 199 (Wyoming, 1991); *People v. Sanders*, 904 P2d 1311 (Colorado, 1995); *People v. Cosme*, 397 NE2d 1319 (New York, 1979).

Georgia and many other states have rejected the defendant's argument. Janet Randolph's consent to search was valid even if the defendant objected. The cocaine observed when Sgt. Murray initially entered the residence should not be suppressed. His observation of the cocaine while lawfully in the residence provided probable cause for issuance of a warrant to search the premises for additional cocaine.

2. THE COCAINE SHOULD NOT BE SUPPRESSED BECAUSE THERE WAS A SOURCE INDEPENDENT OF THE ENTRY INTO THE RESIDENCE THAT SUPPORTED THE ISSUANCE OF THE SEARCH WARRANT.

Even if the Court assumes, for the purpose of argument, that Sgt. Murray's initial entry into the residence

was not authorized, this Court's analysis of the admissibility of the evidence does not end. The "independent source" doctrine permits introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from unlawful activities untainted by the initial illegality. *Murray v. United States*, 487 U.S. 533 (108 S.Ct. 2529) (1988); *Segura v. United States*, 468 U.S. 796 (104 S.Ct. 3380) (1984).

"The admissibility of [evidence] under the independent source exception depends on whether authorities established probable cause to seize the [evidence], either before or after the illegal search, independent of any facts revealed by the unlawful search." *Waldrip v. State*, 267 Ga. 739(18) (482 SE2d 299) (1997).

The independent evidence is Janet Randolph's statements against her penal interest that cocaine was being kept in the residence she jointly occupied with her husband. That statement alone provides sufficient reliability to establish probable cause for a search of the residence. *Sosebee v. State*, 227 Ga. App. 21 (488 SE2d 102) (1997).

If the information concerning Sgt. Murray's observation of cocaine inside the residence is excised from the affidavit for search warrant, the remaining information is sufficient to establish probable cause for the issuance of the search warrant. *Dorminey v. State*, 205 Ga. App. 806 (423 SE2d 698) (1992).

Even without the evidence obtained by Sgt. Murray's initial entry the cocaine would have been inevitably discovered. Suppression is not appropriate under these circumstances.

CONCLUSION

The defendant's motion to suppress should be denied for each of the foregoing reasons.

Respectfully submitted,

/s/ Richard E. Thomas
Richard E. Thomas
Special Assistant District Attorney
Southwestern Judicial Circuit
State Bar No. 705850

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[Exhibit A Omitted In Printing]

IN THE SUPERIOR COURT OF SUMTER COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,)
)
v.)
) Case No. 01-R-699-P
SCOTT FITZ RANDOLPH,)
)
Defendant.)

ORDER OF THE COURT

(Filed October 17, 2002)

Defendant, having filed a Motion to Suppress with this Court, and a hearing on that Motion having been held on October 3, 2002 at the Sumter County Courthouse in Americus, Georgia, and upon due consideration of all the information presented in this case, the Court finds the following:

That Defendant's wife was still in possession of common authority to grant consent for police to search the marital home;

That under *Kendrick v. State*, 211 Ga. App. 599 (1993), one spouse can consent to a search of the marital premises, and the other spouse cannot withdraw that consent, regardless of the other spouse's presence or absence at the time the consent was given and knowledge of that consent being given; and

That even though Defendant's wife used knowledge gained from communication between husband and wife, and knew the harm that could result from her consent to search, she was fully competent to grant such consent to search.

In accordance with the foregoing findings, it is hereby

ORDERED that Defendant's Motion to Suppress is DENIED.

DONE THIS the 17th day of October, 2002.

/s/ George M. Peagler, Jr.
Judge, Sumter County
Superior Court
Southwestern Judicial
Circuit